

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Service Rules for the 746-764	)	WT Docket No. 99-168
and 776-794 MHz Bands,	)	
and Revisions to Part 27 of the	)	
Commission's Rules	)	
(Television Channels 60-69)	)	
	)	
Reallocation and Service Rules for the	)	GN Docket No. 01-74
698-746 MHz Spectrum Band	)	
(Television Channels 52-59)	)	
	)	
Auction of Licenses in the	)	DA 02-260
747-762 and 777-792 MHz	)	Report No. AUC 02-31-A
Bands Scheduled for June 19, 2002	)	(Auction No. 31)
	)	
Auction of Licenses in the	)	DA 02-563
698-746 MHz Band	)	Report No. AUC 02-44-B
Scheduled for June 19, 2002	)	(Auction No. 44)

To: The Commission

**APPLICATION FOR REVIEW**

Pursuant to Section 1.115 of the Commission's Rules,<sup>1</sup> the Cellular Telecommunications & Internet Association ("CTIA")<sup>2</sup> hereby submits this Application for Review of the Wireless Telecommunications Bureau's denial of CTIA's April 3, 2002, request to postpone the auction of licenses in the Upper and Lower 700 MHz bands

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<sup>1</sup> 47 C.F.R. § 1.115.

<sup>2</sup> CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

(Auction Nos. 31 and 44).<sup>3</sup> CTIA respectfully requests that the Commission delay the auction of licenses in the 700 MHz band beyond the current scheduled start date of June 19, 2002. Given the short time remaining before the May 8, 2002, deadline for the FCC Form 175 filings indicating an intention to bid in these auctions, CTIA seeks expedited consideration of this request.

In its letter denying CTIA's request, the Wireless Bureau recognizes there are special circumstances regarding the 700 MHz band that create uncertainty for potential bidders.<sup>4</sup> Moreover, the Wireless Bureau concedes that the "uncertainties about the availability of certain portions of these bands may continue for some time."<sup>5</sup> CTIA believes that efficient spectrum management goals would be far better served if prospective bidders could obtain greater certainty and clarity regarding the realistic measures that will be required to clear the band of incumbents prior to the auctions, and a better sense as to when those measures could be successfully implemented. Indeed, on five previous occasions, the Commission has pushed back the original September 30, 2000, statutory auction date for the auction of the Upper 700 MHz band (channel 60-69 UHF TV band, 746-806 MHz), based on the uncertainty over when or how the incumbent broadcasters might be convinced to leave the band.<sup>6</sup>

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<sup>3</sup> April 10, 2002, Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to Thomas E. Wheeler, President/CEO, Cellular Telecommunications & Internet Association, denying CTIA's Request for Delay of Auction Nos. 31 and 44, DA 02-857 (rel. April 11, 2002)("Wireless Bureau Denial").

<sup>4</sup> Wireless Bureau Denial, at 1.

<sup>5</sup> *Id.*, at 2.

<sup>6</sup> In an April 22, 2002 *ex parte* letter, the Spectrum Clearing Alliance reports that "a significant and increasing number of upper 700 MHz broadcasters ...

Without a reasonable understanding of when the band could be made available for commercial service, it is exceptionally difficult for industry to make rational business decisions as to whether even to participate in an auction. Under Section 309(j)(3)(E)(ii) of the Communications Act, the Commission is entrusted by Congress “to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services,” after issuance of bidding rules.<sup>7</sup> If the auction proceeds as scheduled on June 19th, the Commission will not be fulfilling its duties under Section 309 (j). Under the current conditions, interested parties will not be able to “evaluate the availability of equipment for the relevant services” because manufacturers will not focus on developing equipment for this band until the timing of availability of the spectrum is clarified. Further, the fact

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[who] comprise approximately 40% of the encumbered broadcast spectrum” have joined the Alliance, and that they continue to add members “at an accelerating pace.” *See Ex Parte* Letter from Dow, Lohnes & Albertson, counsel to the Spectrum Clearing Alliance, to Michael K. Powell, Chairman, FCC, in WT Docket No. 99-168 & GN Docket No. 01-74 (April 22, 2002), at n.1.

Rather than removing uncertainty, this concerted action by a combination of licensees who clearly exercise market power over the disposition of the upper 700 MHz band spectrum raises antitrust concerns, and thus creates even more uncertainty. Not only do the members of the Alliance have the ability to set the price for clearing the band in advance of the statutory requirements, by exploiting the time value of money, the Alliance is engaged in transferring revenues that properly belong to the American public to entities that received their licenses for free.

<sup>7</sup> 47 U.S.C. § 309 (j) provides:

(3) “. . . [T]he Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in Section 1 of this Act and the following objectives:

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed –

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.

that the timing of the availability of the spectrum for commercial use is not known and will not be known before the June auction date makes “develop[ment] of business plans” and analysis of “market conditions” virtually impossible.

The Wireless Bureau Denial also states that the Congress has taken no action on the Administration’s proposal to delay these auctions. While this might have been true when the letter was written, bipartisan legislation to delay the 700 MHz auctions has now been introduced in the U.S. House of Representatives with fifty-two (52) co-sponsors. This legislation, the Auction Reform Act of 2002, finds that circumstances in the telecommunications market have changed dramatically since 1997, when Congress originally set the timing of these auctions, raising serious questions as to whether the statutory deadlines are consistent with sound telecommunications policy and spectrum management principles.

The Auction Reform Act of 2002 legislation also finds that the study being conducted by the National Telecommunications and Information Administration (“NTIA”), in consultation with the Department of Defense, to determine whether the Department of Defense can share or relinquish additional spectrum will not be completed until after the June 19<sup>th</sup> auction date. This will “[create] further uncertainty as to whether the frequencies in the 700 MHz band will be put to their highest and best use for the benefit of consumers.”<sup>8</sup>

As CTIA noted in its April 3 request, the wireless industry has worked diligently with the Commission and NTIA to ensure that 120 MHz of harmonized spectrum is made available for advanced services. Significant work still remains to secure that spectrum,

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<sup>8</sup> *Auction Reform Act of 2002*, at Sec. 2(3).

part of which currently is held by the Department of Defense. The uncertainty surrounding the availability and timing of the auction for advanced wireless services spectrum means that companies would not be able to assess their spectrum options effectively before having to decide on a 700 MHz auction strategy if those auctions were held in June. At a minimum, the FCC should not auction the 700 MHz bands until the broader proceeding on advanced wireless services spectrum is concluded, and that spectrum is auctioned.

The pending Auction Reform Act of 2002 represents a significant change in circumstances subsequent to the Wireless Bureau Denial. The legislation affects the interest of all potential users of this band, including not only commercial users, but public safety and homeland security users as well. Indeed, the Bill contains a finding that the 700 MHz band may provide a solution for the interference problems Public Safety communications are experiencing in the 800 MHz band, and that the Commission should not hold the 700 MHz auction before the Commission has resolved the 800 MHz interference issues.<sup>9</sup> The Administration is searching for solutions to Homeland Security spectrum needs for national security and public safety. As noted above, the 700 MHz band could offer some potential solutions – but not if the spectrum has been auctioned prematurely.

CTIA recognizes that the Commission was originally subject to a statutory deadline of September 30, 2000, for the Upper 700 MHz and is subject to a September 30, 2002, deadline for depositing revenues into the Treasury from the 700 MHz auctions. CTIA submits, however, that these statutory deadlines are inconsistent with the

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requirements of Section 309 (j) in the context of these auctions. In situations where there is a statutory conflict such as the one that is present here, the conflict may be reconciled through reasonable statutory interpretation. Indeed, this is precisely what the Commission has done in taking action to delay other spectrum auctions, including the earlier delay of the Upper 700 MHz band auction, and will presumably also do in delaying the mandated auctions of the 1710 – 1755 MHz and 2110 – 2150 MHz bands – which also are subject to a September 30, 2002 deadline. A reasonable interpretation of these conflicting statutes should lead the Commission to postpone both of the 700 MHz auctions to further its statutory and public interest spectrum management responsibilities, especially in this instance, given the broad bipartisan support for the Auction Reform Bill of 2002.

The Administration has recognized the inherent problems with auctioning these two bands in June, and has strongly stated its desire to delay the auction, awaiting an overall spectrum plan for advanced wireless spectrum to be delivered this summer. On April 17, 2002, the Secretary of Commerce wrote the Commission stating that “[u]ntil more certainty exists about the means for and timing of such spectrum clearing, an auction of the Upper and Lower 700 MHz bands would be premature and contrary to public interest.”<sup>10</sup> CTIA agrees with Secretary Evans that delaying the auction of these bands will provide the time needed to resolve the existing uncertainties about when and how this spectrum will be cleared. “But, until then, too much uncertainty remains to

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<sup>9</sup> *Id.*, at Sec. 2(4).

<sup>10</sup> April 17, 2002, Letter from Donald L. Evans, Secretary of Commerce, to Michael K. Powell, Chairman, Federal Communications Commission, available at [http://www.ntia.doc.gov/ntiahome/fccfilings/2002/700auction\\_41702.htm](http://www.ntia.doc.gov/ntiahome/fccfilings/2002/700auction_41702.htm).

move forward with the auctioning of this spectrum.”<sup>11</sup> To continue to auction spectrum on an ad hoc basis, absent such a plan, will only exacerbate the lack of policy direction that already is affecting consumers and the economy. A delay would also be consistent with the Administration’s FY 2003 budget proposals.

As the Commission has recognized in the past when it postponed Auction 31 for the Upper 700 MHz band, a postponement of these two auctions not only is warranted, but also is the best means for satisfying the Commission’s responsibilities to manage the radio spectrum in the public interest. CTIA respectfully submits that the public interest requires that the Commission delay the above-referenced auction of licenses in the 700 MHz band beyond the current scheduled start date of June 19, 2002.

Respectfully submitted,

**CELLULAR TELECOMMUNICATIONS  
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<sup>11</sup> *Id.*

## **CERTIFICATE OF SERVICE**

I, Meghan Smith, hereby certify that on this 24<sup>th</sup> day of April, 2002, I

served copies of the foregoing Application for Review, via e-mail or regular mail upon  
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